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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL LEWIS,

Defendant and Appellant.

F071853

(Super. Ct. No. MCR017299)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. James E. Oakley, Judge.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Amanda D. Cary, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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SEE DISSENTING OPINION

The Three Strikes Reform Act of 2012 (hereafter Proposition 36 or the Act) created a postconviction release proceeding for third strike offenders serving indeterminate life sentences for crimes that are not serious or violent felonies. If such an inmate meets the criteria enumerated in Penal Code section 1170.126, subdivision (e), he or she will be resentenced as a second strike offender unless the court determines such resentencing would pose an unreasonable risk of danger to public safety.[1] (§ 1170.126, subd. (f); *People v. Yearwood* (2013) 213 Cal.App.4th 161, 168.)

After the Act went into effect, Michael Lewis (defendant), an inmate serving a term of 21 years plus 50 years to life in prison following conviction of felonies that were not violent (as defined by § 667.5, subd. (c)) or serious (as defined by § 1192.7, subd. (c)) filed a petition for resentencing under the Act.[2] Following a hearing, the petition was denied. On appeal, we vacated the ruling and remanded the matter so the petition could be heard by the judge who imposed sentence in defendant's commitment case, as required by section 1170.126, subdivision (b). (See *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1301.) On remand, the matter was heard by the original sentencing judge and again denied.

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[1] Further statutory references are to the Penal Code unless otherwise stated.

[2] By separate order, we have taken judicial notice of the record filed in this court in case No. F067587, defendant's prior appeal from denial of his petition for resentencing. Portions of our summary of the facts and procedural history are taken from that record, including our opinion in that case.

In a footnote in his opening brief in the present appeal, defendant asks that we also take judicial notice of the records and files in case No. F045966, defendant's appeal with respect to his commitment offenses. Defendant's request is ineffective: He has failed to comply with rule 8.252(a)(1) of the California Rules of Court, which specifies that a party seeking to obtain judicial notice by a reviewing court must serve and file a separate motion with a proposed order. We note, however, that during the course of defendant's appeal in case No. F067587, we took judicial notice of this court's opinion in case No. F045966, and included facts derived therefrom in our opinion in case No. F067587. Accordingly, the relevant facts concerning defendant's commitment offenses are already properly before us in the current appeal.

We conclude the court did not abuse its discretion by finding resentencing defendant would pose an unreasonable risk of danger to public safety. We reject defendant's claims the prosecution failed to meet its burden of proof, there was no showing of current dangerousness, and section 1170.18, subdivision (c) modified section 1170.126, subdivision (f).[3] We affirm the order denying defendant's petition.

FACTS AND PROCEDURAL HISTORY

On June 25, 2003, an undercover officer purchased .47 grams of methamphetamine from defendant for $20. On July 2, 2003, the same officer purchased .15 grams of base cocaine from defendant for $20. Defendant subsequently was convicted by a jury of selling methamphetamine (Health & Saf. Code, § 11379, subd. (a); count one) and selling cocaine base (*id*., § 11352, subd. (a); count two). In a bifurcated proceeding, he admitted three prior drug conviction enhancements as to count one (*id*., § 11370, subd. (c)) and three as to count two (*id*., § 11370, subd. (a)). He also admitted having suffered robbery convictions in 1980 and 1988, both of which were strikes (§ 667, subds. (b)-(i)), and having served three prior prison terms (§ 667.5, subd. (b)). He was sentenced to consecutive indeterminate terms of 25 years to life on counts one and two, for a total indeterminate term of 50 years to life, plus consecutive enhancements that resulted in a determinate sentence of 21 years.

On January 25, 2013, defendant filed a petition for resentencing under section 1170.126. The People filed written opposition in which they set out, inter alia, defendant's extensive criminal history, including California Youth Authority commitments in 1972 and 1974, and conviction of one or more felonies on seven occasions and misdemeanors on four occasions between 1976 and 2004, when defendant was sentenced to prison for his commitment offenses; a violation of probation in 1982;

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[3] This issue is currently pending before the California Supreme Court. (See, e.g., *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted Feb. 18, 2015, S223825; *People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted Feb. 18, 2015, S223676.)

three violations of parole from 1989 to 1991; and six violations of parole from 1996 to 1999. The People also set out 15 in-prison disciplinary violations defendant incurred between 2005 and 2012. While most involved failure to comply with grooming standards or to report to class or a work assignment or to perform an assigned task, one was for disruptive behavior,[4] another was for refusing a direct order in a yard-down situation,[5] and another was for possession of inmate-manufactured alcohol.[6] The People argued resentencing defendant would result in an unreasonable risk of danger to public safety, particularly since defendant's criminal history showed defendant committed new crimes almost as soon as he was released from custody, and he had "no track record of living as a free adult and not committing crimes . . . ." The People argued that based on defendant's criminal history, defendant was likely to reoffend if released.

Defendant responded by setting out his record of rehabilitation and arguing in favor of resentencing.[7] Defendant argued the focus had to be on whether he posed a current risk of danger to society, and he pointed out his prior convictions were primarily

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[4] Supporting documentation related defendant became very disruptive in class after being asked to work only on the educational materials provided to him. Defendant became verbally hostile toward the teacher, and, when directed to remove himself from the room, defendant tossed a pencil toward the teacher's desk at which the teacher was standing.

[5] Supporting documentation related defendant refused to comply immediately with orders to get down on the ground in a prone position during an emergency situation, thereby compromising the safety and security of staff and other inmates on the yard.

[6] Supporting documentation related that a random search of the cell defendant shared with another inmate revealed approximately two gallons of "pruno." Defendant stated he made the substance to drink, but did not take it every day.

[7] Defendant submitted numerous "chronos" documenting his participation in, and receipt of favorable reviews from counselors and instructors with respect to, various counseling programs, work assignments, and educational programs, including workshops sponsored by the Hope for Strikers activity group, an intensive 16-session treatment modality conducted by the Addiction Recovery Counseling program, Alcoholics Anonymous, a literacy program, and an anger management program.

for property and drug offenses, he did not have a long or consistent history of violence, he had not received any new law violations while incarcerated, his current convictions were for nonviolent drug offenses, his strike convictions were more than 25 years old, and none of his in-prison disciplinary violations were serious or resulted in significant sanctions. Defendant also asserted that although his prospects for employment upon release from prison would be limited by his degenerative spine disease that left him disabled, he planned on going to school to improve some basic skills. Defendant represented he had support from his family and had daughters who had offered him a home.

As previously stated, the petition was denied, but we vacated the ruling and remanded the matter for a new hearing. In preparation for that hearing, defendant referred the court to his original response, and also provided supplemental information consisting of letters of recommendation and positive reports from persons who worked with and tutored defendant in the Free to Succeed literacy program at San Quentin. The People continued to oppose resentencing, and referred the court to their original written opposition.

At the hearing, defense counsel pointed out defendant had continued to participate in programs specifically geared to adapting himself to the community, should he be released, after the original denial of his petition. Counsel argued it had been more than 25 years since defendant had been convicted of violence toward someone, whether out in the community or in prison, defendant was continuing to improve in terms of literacy and education, and defendant had support, in terms of both his family (some of whom were at the hearing) and volunteers who were willing to reach out to him beyond prison.

The prosecutor agreed defendant had taken steps to improve his reading, and he conceded the only rules violation defendant had incurred after the initial denial of his petition involved not standing up for a count, which the prosecutor discounted since it appeared defendant had been sleeping. The prosecutor argued, however, that defendant

had a long history demonstrating how he acted when not in prison; moreover, he had a number of rules violations even in the strictly structured prison environment. The prosecutor asserted defendant had been "given chance after chance," but in the almost 30 years between his first offense and his commitment offenses, there had been a "steady, consistent pattern of criminal activity [and] violations of parole," because of which the People believed defendant was a risk to public safety if released.

At the conclusion of argument, the trial court stated:

> "The Court has considered all of your comments, in addition to review of the entire file. The Court is going to deny the motion. I do want to explain the reasons. The offenses of which the defendant was convicted, in the Court's mind, cannot be viewed in isolation as being minor offenses. The Court heard the trial. [Defendant] was convicted of a felony violation of Section 11352[, subdivision](a) of the Health and Safety Code . . . , sale of cocaine, and a felony violation of Section 11379[, subdivision](a) of the Health and Safety Code, sale of methamphetamine. Both offenses occurred approximately one week apart. They were committed at a neighborhood park. In each offense, the defendant engaged in the participation of an accomplice, one of which referred to the defendant during the commission of the offense as, quote, Uncle Mike, unquote. The defendant admitted to the conviction of two prior violent felonies. In addition, he served prior prison terms for three prior felony convictions for drug sales, which sales occurred in 1991 at the very same neighborhood park at which the present offenses were committed some 12 years later.
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> "The Court has considered the rehabilitation efforts of the defendant while in prison, and I commend him for those.
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> "However, the Court also notes that from 2005 through 2010, the defendant sustained approximately 15 disciplinary violations while in custody. The Court does not place great weight in those, because the Court does not know the circumstances behind them, and, again, the Court does put weight to some extent on the observations of [defense counsel], that these violations may not be as serious as other violations could be.
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> "Further, the Court has considered the remoteness of the two previous violent felonies, one was committed in 1980, and the other committed in 1988. However, the Court notes that in 1972, within one year after his 18th birthday, the defendant was committed to the California

> Youth Authority on a grand theft conviction. Thereafter, from 1972 through 2003, the year of the commission of the present offenses, the defendant has almost continually been either in custody or committing new offenses.
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> "In addition to having served prison terms in five previous cases, the defendant has committed numerous probation and parole violations, having been returned to state prison on approximately nine separate occasions for violations of parole.
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> "For these reasons, pursuant to subdivision (f) of . . . Section 1170.126, the Court determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety; therefore, the Court denies the motion and the defendant is remanded."

DISCUSSION

Defendant asserts the trial court abused its discretion by denying defendant's petition for resentencing. He contends: (1) The presumptive sentencing choice for an eligible petitioner under section 1170.126, subdivision (f) is sentencing as a second strike offender; (2) The People have the burden of proving by a preponderance of the evidence that defendant poses an unreasonable risk of danger to public safety; (3) The definition of " 'unreasonable risk of danger to public safety' " set out in subdivision (c) of section 1170.18, as enacted by Proposition 47, applies to resentencing determinations made under Proposition 36; and (4) The proper focus is on a petitioner's current dangerousness, rather than his or her past history.

We recently rejected the first three arguments. In *People v. Buford* (2016) 4 Cal.App.5th 886, petition for review pending, petition filed December 6, 2016, (*Buford*), we explained that the People have the burden of establishing, by a preponderance of the evidence, facts from which a determination resentencing a petitioner would pose an unreasonable risk of danger to public safety reasonably can be made; however, the ultimate determination resentencing would pose an unreasonable risk of danger is a discretionary one for the trial court. (*Id.* at pp. 898-899, 901.) We also concluded section 1170.126 does not establish or contain a presumption that a petitioner's sentence must be

reduced. (*Buford*, *supra*, at pp. 901, 902-903.) Finally, we rejected the notion subdivision (c) of section 1170.18, which was enacted pursuant to Proposition 47, modifies subdivision (f) of section 1170.126. (*Buford, supra*, at pp. 903-913.) We find our reasoning and conclusions in *Buford* of persuasive value with respect to the issues raised in the present case, and see no reason to depart from them or repeat them here.

We agree, however, with defendant's assertion the proper focus in a section 1170.126, subdivision (f) analysis is on whether the petitioner *currently* poses an unreasonable risk of danger to public safety. (See *Buford*, *supra*, 4 Cal.App.5th at pp. 913-914; cf. *In re Shaputis* (2008) 44 Cal.4th 1241, 1254; *In re Lawrence* (2008) 44 Cal.4th 1181, 1214.) As is the case when the grant or denial of parole is at issue, we believe a trial court may properly deny resentencing under the Act based solely on immutable facts such as a petitioner's criminal history "*only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.]" (*In re Lawrence*, *supra*, at p. 1221.)[8] " '[T]he relevant inquiry is whether [a petitioner's prior criminal and/or disciplinary history], when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years [later]. This inquiry is . . . an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude. [Citation.]' [Citation.]" (*In re Shaputis*, *supra*, 44 Cal.4th at pp. 1254-1255.)

In the present case, the trial court relied to a large degree on defendant's criminal and disciplinary history. On the facts of this case, however, that extensive history demonstrates defendant's marked inability to remain free from custody without

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[8] We decline to determine how and to what extent parole cases inform the decision whether to resentence a petitioner under the Act or our review of such a ruling.

reoffending, or at least violating the terms of his release, for any appreciable period of time. Although, as the trial court noted, defendant has undertaken commendable efforts at rehabilitation while in prison, the trial court reasonably could conclude the pattern of reoffending established by defendant's past history is indeed predictive of current dangerousness years later, even in light of defendant's age and physical state.

"[T]he term judicial discretion 'implies absence of arbitrary determination, capricious disposition or whimsical thinking.' [Citation.] Moreover, discretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72; accord, *People v. Johnson* (2015) 61 Cal.4th 734, 750.) Defendant has not borne his burden on appeal of establishing the trial court's ruling exceeds the bounds of reason. (See *People v. Carmony* (2004) 33 Cal.4th 367, 376.) That the record presents facts on which reasonable minds may differ is insufficient to establish an abuse of discretion. (*Id*. at p. 377; *People v. Moya* (1986) 184 Cal.App.3d 1307, 1313, fn. 2.)

DISPOSITION

The order denying the petition for resentencing is affirmed.

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DETJEN, J.

I CONCUR:

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HILL, P.J.

PEÑA, J.

For the reasons stated in my separate opinion in *People v. Buford* (2016) 4 Cal.App.5th 886, 914-918, this matter should be remanded for reconsideration of the petition, using the appropriate standard as required by Penal Code section 1170.18, subdivision (c) (§ 1170.18(c)). Section 1170.18(c) defines the phrase "unreasonable risk of danger to public safety" as "an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of Section 667." As mandated by section 1170.18(c), this definition applies "throughout" the Penal Code. The trial court here refused to apply this defined standard, which was in effect at the time of the hearing on the petition. In doing so, the court misunderstood the scope of its discretion.[1] (*People v. Cordova* (2016) 248 Cal.App.4th 543, 547, review granted Aug. 31, 2016, S236179.) Consequently, the case must be remanded to allow a proper exercise of that discretion according to a correct understanding of the law and governing principles. (*Ibid*.; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977 [all exercises of discretion "'must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue'"].)

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PEÑA, J.

[1]In due deference to the learned trial judge, the issue of whether Proposition 47's definition of unreasonable risk of danger to public safety applies to Proposition 36 resentencing proceedings is pending before the California Supreme Court in *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted February 18, 2015, S223825.